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ALEXANDER L. STEVAS,
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No. 80-1767

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STEVIE STUMBO - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is it a denial of a criminal defendant's fourteenth amendment right to due process of law for a state court to permit, over repeated defense objection, a private attorney, employed by the deceased's mother, to act as the prosecutor when throughout defendant's murder trial the private prosecutor engaged in repeated conduct acknowledged by the Kentucky Supreme Court to be serious and improper?

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No.

STEVIE STUMBO, - - - - - *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, - *Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

PETTTION FOR WRIT OF CERTIORARI

Petitioner, Stevie Stumbo, respectfully prays that a Writ of Certiorari issue to review the opinion of the Supreme Court of Kentucky entered on December 16, 1980.

OPINION BELOW

The opinion of the Supreme Court of Kentucky was rendered on December 16, 1980 and is not to be published [Appendix, 1-6].

JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on December 16, 1980. Rehearing was denied February 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right to a . . . trial, by an impartial jury. . . .

The Fourteenth Amendment to the United States Constitution, Section One, in pertinent part:

> . . . nor shall any State deprive any person of . . . liberty . . . without due process of law . . .

STATEMENT OF THE CASE

The petitioner, Stevie Stumbo, was indicted by the August, 1979 Floyd County Grand Jury for the offense of murder in violation of Kentucky Revised Statute [KRS] 507.020. [Transcript of Record, hereinafter TR 1].

On March 24, 1980 petitioner filed a motion and affidavit to recuse the privately employed prosecutor retained by the family of the deceased to assist in petitioner's prosecution [TR 18-20]. Petitioner's motion alleged that since the retained prosecutor had received a fee, his duty would be to strive for a conviction and severe sentence, rather than to seek justice [TR 18-20]. Petitioner further contended that permitting the retained prosecutor to assist in the prosecution would "deny [petitioner] due process of law and the funda-

mental right to a fair trial as guaranteed him by the Fourteenth Amendment to the United States Constitution" [TR 19].

The first of two pretrial hearings on the recusal motion was held on March 25, 1980 [Transcript of Evidence, hereinafter TE 2-7]. During the course of his argument petitioner's trial counsel suggested that the privately employed prosecutor had "sidetracked" negotiations regarding a plea offer which had been tentatively accepted by the Commonwealth's Attorney [TE 5]. The trial court overruled petitioner's recusal motion with the qualification that

> . . . the Commonwealth Attorney demonstrates to the court that he is in control of the case and that the privately employed counsel is merely assisting him and acting under his direction. . . . [TE 7.]

Petitioner renewed his motion on April 2, 1980, the day his trial commenced [TE 22, 23]. After hearing evidence and additional argument by counsel, the trial judge ruled that the family of the victim had a right to employ counsel to prosecute petitioner [TE 23-40]. Explaining his reasoning for overruling petitioner's motion, the trial judge observed

> that is what the [deceased's] family . . . want[s]. They want vengeance. Really, in any case of this nature they want vengeance.
>
> * * * *
>
> And sometimes they feel like the Commonwealth Attorney may not be inclined to do what they want

and, therefore, they feel like they want to hire somebody else [TE 40.]

Indicating that the evidence of petitioner's guilt was "not overwhelming," the Kentucky Supreme Court summarized the testimony presented at petitioner's trial in its opinion:

> On July 28, 1979, several men gathered at a turkey shoot in rural Floyd County. [Petitioner] Stumbo arrived in a car with his cousin, Milton Stumbo. Already present at the scene was Larry Johnson, who was a close friend and brother-in-law of the [petitioner]. Larry and Milton argued. Milton got his .357 Magnum revolver out of his car and fired two shots into the ground in front of Larry. Then, at [petitioner's] urging, Milton and the [petitioner] got into the car to leave. However, after a further exchange of words between Milton and Larry, Milton, leaving the revolver in the car, got out to confront Larry and a fist fight ensued between the two. The [petitioner] stuck the revolver into his pants in the small of his back and got out of the car to watch the fight. Milton and Larry fought several times, ending with Milton prostrate, and Larry leaning over him hitting him. As [petitioner] moved in to break the two men up, he had the revolver in his hand. The gun discharged into Larry's stomach and he died a short time later.
>
> At trial, [petitioner] admitted he was holding the revolver when the shot was fired, but insisted the shooting was accidental. *Stumbo* v. *Commonwealth,* Memorandum Opinion at 1-2 (File No. 80-SC-422-MR; December 16, 1980).

Continuing, the opinion noted that:

> Testimony at trial from eyewitnesses as to what actually happened when the shot was fired is contradictory, and evidence of [petitioner's] guilt in intentionally causing Larry's death is not overwhelming. The jury, however, after considering all the evidence, found [petitioner] guilty of first degree murder. *Id.*

During petitioner's trial, the private prosecutor referred to the deceased as "the dead boy" on at least nine separate occasions [TE 92-93, 109-112, 165]. Petitioner's objections to these comments were repeatedly overruled by the trial court [TE 109-112, 165]. Over petitioner's repeated objections and motions for mistrial, the retained prosecutor shouted at petitioner's witnesses while he was conducting his cross-examination [TE 167, 168, 257, 258, 268, 325, 336]. The trial court finally instructed the private prosecutor to "tone it down" [TE 336].

Again over petitioner's objection, the private prosecutor flourished a revolver in front of the jury and in the face of petitioner's witnesses [TE 259]. Moreover, during his cross-examination of petitioner, the retained prosecutor repeatedly pulled the trigger on the handgun involved in the shooting [TE 334]. The trial judge, pursuant to petitioner's objection, told the prosecutor: "Don't be snapping the gun before the jury" [TE 334, 335].

Two examples from the transcript of the hired prosecutor's conduct and the trial court's rulings are representative:

Mr. Burns: I am a public prosecutor right now. I represent you and all these people.

Ladies and gentlemen . . . Let's look at the real facts . . . one dead young man who is lying out on yonder hill, grave covered with wilted flowers, whose body will never move until higher power moves it—

Mr. Johnson: Objection to argument calculated to inflame and prejudice the jury.

The Court: Overruled.

Mr. Burns: —and you have another young man here that committed the crime of murder, in our opinion—

Mr. Johnson: Objection to his stating his opinion.

The Court: Overruled. He has a right to state his opinion in his argument. [TE 378.]

* * * * * * *

Mr. Burns: But along come "Johnny Murder Boy."

Mr. Johnson: Objection, Your Honor, to the defendant being characterized as "Johnny Murder Boy."

The Court: Overruled.

Mr. Johnson: He can call him "Johnny Murder Boy"?

The Court: Overruled. [TE 379-380.]

Continuing, the private prosecutor again called petitioner "Johnny Murder Boy," and described the shooting as being "cold-blooded murder" [TE 384]. Referring to petitioner's defense, the retained prosecutor

told the jury: "[i]f you believe that cock and bull story, murder cases will be piled up in your county that you couldn't stack in this courtroom" [TE 383]. Petitioner entered objections to all of the above cited comments, only to be overruled by the trial court [TE 377, 378, 379, 380, 383]. In the interest of brevity, petitioner will not detail the abundant instances of alleged misconduct by the hired prosecutor not previously mentioned.

At the close of the Commonwealth's case, petitioner renewed his motion to recuse the privately employed prosecutor [TE 181]. As grounds for renewing his motion, petitioner noted that the Commonwealth's Attorney was "basically not participating in the prosecution" [TE 181, 182]. Petitioner also reminded the trial judge of his "numerous objections" to the private prosecutor's histrionics and improprieties, which were "indicative of his monetary interest in the outcome of this case, not for his concern for the justice involved" [TE 183]. The trial court overruled petitioner's renewed motion [TE 183].

In the course of directing the prosecution of petitioner, Mr. Burns had assistance from his private law partner who remained at counsel table throughout the trial [TE 90, 388, 389]. The only active involvement that the elected Commonwealth's Attorney had in the entire prosecution was an abbreviated voir dire examination of the jury, during which he asked a few questions of the prospective jurors [TE 52-59]. In contrast, the private prosecutor made the opening statement to the jury, conducted the entire direct examina-

tion of the Commonwealth's witnesses, cross-examined all of petitioner's witnesses, made all of the procedural objections and arguments at the bench and in chambers, and delivered the summation to the jury [TE 90, 107, 145, 161, 191, 207, 257, 290, 318, 372].

The jury convicted petitioner of the charged offense of murder and recommended the minimum sentence of twenty years in the state penitentiary [TR 50, 51].

On appeal petitioner challenged both the status of the hired prosecutor and his conduct at trial in federal constitutional terms. Petitioner contended, *inter alia,* that he was denied "his right to due process of law . . . and to fundamental fairness . . . as guaranteed by the Fourteenth Amendment to the United States Constitution," where the trial court allowed the prosecution to be directed by private counsel retained by the family of the victim and where the private prosecutor "continuously engage[d] in conduct designed solely to prejudice the jury" [Stumbo's brief in the Kentucky Supreme Court at 6, 13, 14, 17, 18, 23].

The Kentucky Supreme Court agreed that the private prosecutor had engaged in "serious" and "improper" conduct. *Stumbo* at 3.

> Stumbo's next contention is that the conduct and remarks of Mr. Burns during both cross-examination and closing argument were prejudicial to him and were calculated to inflame the jury. Instances of Mr. Burns' misconduct cited by Stumbo include: calling the victim "the dead boy" on ten separate occasions during trial; repeatedly shouting at witnesses; flourishing the murder weapon in

> the faces of the jury and the witnesses; snapping the revolver's trigger repeatedly while cross-examing [petitioner]; calling [petitioner] "Johnny Murder Boy"; calling the victim's death an execution; referring to the offense as "cold-blooded murder" several times; calling [petitioner's] defense a "cock-and-bull story"; calling for a guilty verdict to prevent murder cases from being "stacked up" in Floyd County; stating to the jury during closing argument that [petitioner] "committed the crime of murder, in our opinion—"; asking questions of defense witnesses Mr. Burns knew would be denied and for which he knew no proof would be offered; and repeating questions previously ruled inadmissible. [Petitioner] objected to each of the above instances. *Id.*

Nevertheless, the court below affirmed petitioner's murder conviction. In rejecting petitioner's due process claim regarding the private prosecutor the Court noted: "It has long been the law in this jurisdiction that private counsel retained by persons desirous of a conviction are permitted to assist the commonwealth's attorney in the conduct of the prosecution." *Id.* at 2. The Court reasoned that the duly elected prosecutor had participated during voir dire and was present during the remainder of the trial.

As to petitioner's due process claim regarding the totality of the hired prosecutor's misconduct, the Court likewise declined to find error. "[W]e conclude that the misconduct in question did not produce that level of prejudice to [petitioner] which requires reversal." *Id.* at 6. Petitioner now seeks review of this decision.

REASONS FOR GRANTING THE WRIT

The Present Case Properly Presents, in a Clear Context, a Question of Plenary National Significance in the Administration of Criminal Justice Which Has Not Been, But Should Be, Decided By This Court. The Kentucky Supreme Court Opinion Regarding the Employment and Conduct of the Hired Prosecutor in This Case Conflicts With the Rationale of Previous Decisions of This Court and Presents an Important Federal Constitutional Question On Which the Highest Courts of Various States Have Taken Conflicting Positions.

A. THE QUESTION PRESENTED IS NARROW, PROPERLY BEFORE THIS COURT AND CLEARLY PRESENTED IN AN APPROPRIATE CONTEXT.

The question presented in this petition is a narrow one. This Court is asked to decide whether it offends the due process clause for a murder defendant to be prosecuted by a private lawyer hired by the deceased's mother when the "private prosecutor" conducts the entire trial, except a brief voir dire,[1] and engages in what the Supreme Court of Kentucky unanimously describes as serious, improper conduct.[2] Additionally,

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[1]The Commonwealth's Attorney's only participation in the trial was to ask a few questions of the prospective jury panel [TE 52, 56-57]. He also remained at counsel table during the trial. *Stumbo* at 2. Petitioner submits that this was a transparent but apparently successful attempt to legitimize the conduct of the entire trial by the hired prosecutor.

[2]"We find much of the conduct complained of to be *improper*. The most *serious* lapse in prosecutorial discipline . . . This conduct on the part of Mr. Burns *cannot be said to be proper*." *Stumbo* at 3, 6 (emphasis added).

this case presents a situation where there was substantial evidence that the shooting was an accident[3] and is conceivably the type of situation the elected Commonwealth's Attorney[4] would not prosecute or would agree to a plea bargain. Indeed, trial defense counsel complained, without contradiction, that the hired prosecutor's monetary interest may have "sidetracked these plea negotiations"[5] [TE 5]. The factual context of this case dramatizes the constitutional flaws in a state rule which permits "persons desirous of a conviction" to hire a private lawyer and control the prosecution. *Stumbo* at 3.

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[3]Petitioner was trying to break up a fight between his bother-in-law (a "close friend"), the deceased, and his cousin. Petitioner "admitted he was holding the revolver when the shot was fired, but insisted the shooting was accidental. Testimony at trial . . . is *contradictory* and the evidence of [Stumbo's] guilt in intentionally causing Larry's death is *not overwhelming.*" *Stumbo* at 2 (emphasis added). The chief investigating officer, Kentucky State Police Detective DeBoard, testified at the preliminary hearing that the shooting ". . . *does have the ear marks of being accidental.*" [Transcript of Preliminary Hearing at 20; emphasis added.] Petitioner stated: "Oh God. I didn't know it was cocked" when the gun discharged [TE 306].

[4]In Kentucky the prosecutorial role on the trial level is performed by the Commonwealth's Attorney who is a duly elected, constitutionally required officer. Kentucky Constitution, Section 97.

[5]". . . James Allen [the Commonwealth's Attorney] and I discussed plea negotiations, we had arrived at an agreement . . . Allen came back to me [after consulting with the family of the deceased] and told me he had to reject the [deal] . . . I don't know whether or not Mr. Burns [the hired prosecutor] was involved . . . But, certainly, the potential [exists]. . . ." [TE 5].

It is important to note that this is not a case where the hired prosecutor takes a minor part or subordinate role in the proceedings. Nor is this a case where the private prosecutor acts in a professional manner and conducts himself with due regard for the rights of the accused. In either case it could be argued that the defendant suffered no prejudice and that under the totality of the circumstances constitutional error did not occur, or, if it did, it was harmless beyond a reasonable doubt.[6] Instead, the present case graphically illustrates the abuse an accused may be subject to since the private prosecutor is motivated by a pecuniary interest and his ethical responsibility to his client's interest—vengeance—instead of society's interest—justice for all.

Finally, there is no doubt that the federal constitutional question presented here is exactly the same as timely presented to both the trial court and the Kentucky Supreme Court [TR 9; petitioner's brief in the Kentucky Supreme Court]. Trial counsel's objections to the conduct of the hired prosecutor are too numerous to detail in this petition.

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[6]Petitioner does submit that the system of permitting persons "desirous of a conviction" for whatever reason (good or bad motives) to participate in the people's prosecution is so fraught with danger to the rights of all citizens, especially the accused, that it is fundamentally unfair and violates the due process clause of the Fourteenth Amendment.

B. THE OPINION BELOW CONFLICTS WITH THE RATIONALE OF PREVIOUS DECISIONS OF THIS COURT.

In *Berger* v. *United States,* 295 U. S. 78 (1934), a unanimous Court described in detail the role of the public prosecutor under our system of justice. Although speaking of the United States Attorney, this Court's words are equally applicable to a public prosecutor on the state level:

> [The public prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligations to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is *not that it shall win a case, but that justice shall be done.* As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.
>
> It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Id.* at 88 (emphasis added).

The essence of petitioner's due process claim is that there is an inherent and dangerous contradiction when the roles of private advocate and public prosecutor are mixed. The public prosecutor's responsibility is not to "persons desirous of a conviction" but to the people

in general. "Prosecutors . . . represent not an ordinary party but We the People." *Donnelly* v. *DeChristoforo,* 416 U. S. 637, 651 (1974) (dissenting opinion, Douglas, J.).

> The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial. *Id.* at 648-649 (dissenting opinion; Douglas, J.).

It is the ethical obligation of the prosecutor "to seek justice, not merely to convict." American Bar Association Standards for Criminal Justice, *The Prosecution Function,* Standard 3-1.1(c) (1980). "[T]he prosecutor has responsibilities different from those of a lawyer in private practice . . . [T]he prosecutor represents the sovereign . . . [He] is not only an advocate . . ." American Bar Association, Code of Professional Responsibility, EC7-13 (1969).

Despite the hired prosecutor's claim to the jury that "I am a public prosecutor right now. I represent you and all these people"[7] [TE 378], Mr. Burns was ethically required to represent only his employer—the deceased's mother. Code of Professional Responsibility, EC5-1; EC5-14; EC5-21. His interest was not in seeking justice but, as his actions demonstrated, in obtaining a conviction at any cost. This inherent con-

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[7]Defense counsel was cut off when he attempted to discuss Mr. Burns' status as a retained prosecutor during opening statement [TE 105].

flict of interest has led commentators to argue that the use of private prosecutors denies the citizen accused—in this case—Mr. Stumbo—fundamental fairness as guaranteed by the Due Process Clause.

> "Conversely, a privately retained attorney owes his client individual allegiance, and once employed he must not act for an interest even slightly adverse to that of his client in the same general matter. Therefore, in view of the ethical and judicial restrictions imposed on the public prosecutor and the generally recognized loyalties of the private advocate, 'private prosecutor' is a contradiction in terms. The high standard of impartiality required of a prosecutor realistically cannot be expected of the private advocate." *Private Prosecution—the Entrenched Anomaly,* 50 N. Car. L. Rev. 1171, 1173 (1972).

The admittedly improper conduct by the private prosecutor in this case is, standing alone, sufficient to demonstrate a clear violation of petitioner's right to due process of law without an examination of the nature of his role. Petitioner will not engage in a detailed discussion of the instances of misconduct reflected in the record. Suffice it to say that Mr. Burns's conduct made petitioner's trial "so fundamentally unfair as to deny him due process." *Donnelly* v. *DeChristoforo,* 416 U. S. at 646. It follows, therefore, that the combination of employment of a private prosecutor and egregious misconduct by him is certainly a question of federal constitutional magnitude.

> We have here a state case, not a federal one; and the prosecutor is a state official. But we deal with an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment by which the States are bound. *Id.*, 416 U. S. at 649 (dissenting opinion, Douglas, J.).

The rationale of *Berger* and *Donnelly* conflicts with the opinion below.

C. THIS CASE PRESENTS AN IMPORTANT QUESTION IN THE ADMINISTRATION OF CRIMINAL JUSTICE WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

This Court has always been vigilant in guarding against corrosive elements which eat away at our system of justice. Due process protections have been extended to cover situations where the danger to justice is potential in nature. Indeed, the appearance of justice is essential to the respect the judicial system is given by the people. This Court, in *In Re Murchison,* 349 U. S. 133 (1955), stated:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But *our system of law has always endeavored to prevent even the probability of unfairness.* To this end . . . no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. *Id.* at 136 (emphasis added).

In *Tumey* v. *Ohio,* 273 U. S. 510, 522-23 (1927), the mayor of an Ohio town was paid from costs and fines he imposed on traffic offenders. This Court struck down the system, stating:

> That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is of course, the general rule. . . . [I]t certainly violates the fourteenth amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.

While the *Tumey* and *Murchison* Courts directed themselves to situations dealing with bias on the part of the judge, the rationale applies equally well to bias or interest on the part of the prosecutor who is, in essence, in a "quasi-judicial" role as a representative of the public. As stated by the Supreme Court of Missouri, in *State* v. *Harrington,* 534 S. W. 2d 44, 50 (Mo. 1976), when the practice of hired prosecutors was outlawed:

> The modern day prosecutor wields the power of the State's investigatory force, decides whom to indict and prosecute, decides what evidence to submit to the court, negotiates the State's position in plea bargaining and recommends punishment to the court. The entry of a private prosecutor into a criminal prosecution exposes all of these areas to prejudicial influence. We consider such exposure intolerable.

The significance of this issue to the administration of criminal justice may be demonstrated by reference to the Standards for Criminal Justice, Standard 3-2.1, which states: "The prosecution function should be performed by a *public* prosecutor . . ." (emphasis added). The threat that privately employed prosecutors pose to the appearance and reality of justice is a substantial issue in the administration of justice which should be addressed by this Court.

D. THE DECISION BELOW CONFLICTS WITH THE POSITION OF OTHER STATE JURISDICTIONS.

In *State* v. *Harrington, supra* at 48, the Missouri Supreme Court outlawed the practice at issue here. The Court did so in terms indicating the use of hired prosecutors constitutes a denial of due process of law.

> We believe, and hold, that the practice of allowing *private* prosecutors, employed by *private* persons, to participate in the prosecution of criminal defendants is inherently and fundamentally unfair. . . . (Emphasis added.)

See e.g., Biemel v. *State,* 71 Wis. 444, 37 N. W. 244, 245-48 (1888); *McKay* v. *State,* 90 Neb. 63, 132 N. W. 741 (1911). Petitioner submits that the conflict between Kentucky and other jurisdictions is an additional reason for this Court to grant review of this significant constitutional question.

CONCLUSION

The present case presents the compelling, as of yet unresolved, constitutional question of whether, or under what circumstances, a private attorney may be employed by interested parties in a state criminal trial and permitted to prosecute the state's case against a citizen accused. The administration of justice would benefit from a final resolution of this question. The decision below conflicts with the rationale of prior decisions of this Court and the decisions of the highest courts of other jurisdictions. For all the reasons stated above, a writ of certiorari should issue to review the opinion of the Supreme Court of Kentucky.

Respectfully submitted,

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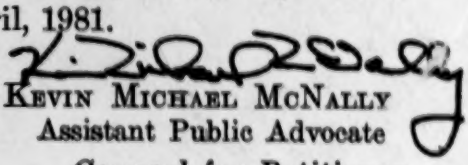
PROOF OF SERVICE

I, Kevin Michael McNally, counsel for petitioner, certify that three (3) copies of this petition for writ of certiorari were mailed, postage prepaid, to Hon. Steven L. Beshear, Attorney General, Capitol Building, Frankfort, Kentucky 40601, Counsel for respondent, the only party required to be served, this 16 day of April, 1981.



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APPENDIX

RENDERED: DECEMBER 16, 1980
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

80-SC-422-MR

STEVE STUMBO - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Floyd Circuit Court
Honorable Hollie Conley, Judge
Indictment No. 79-CR-060

MEMORANDUM OPINION OF THE COURT—AFFIRMING

Appellant Stumbo was convicted of the murder of Larry Johnson and was sentenced to 20 years in prison. We affirm.

On July 28, 1979, several men gathered at a turkey shoot in rural Floyd County. Appellant Stumbo arrived in a car with his cousin, Milton Stumbo. Already present at the scene was Larry Johnson, who was a close friend and brother-in-law of the appellant. Larry and Milton argued. Milton got his .357 Magnum revolver out of his car and fired two shots into the ground in front of Larry. Then, at appellant's urging, Milton and the appellant got into the car to leave. However, after a further exchange of words between Milton and Larry, Milton, leaving the revolver in the car, got out to confront Larry and a fist fight ensued between the two. The appellant stuck the revolver into his

pants in the small of his back and got out of the car to watch the fight. Milton and Larry fought several times, ending with Milton prostrate, and Larry leaning over him hitting him. As appellant moved in to break the two men up, he had the revolver in his hand. The gun discharged into Larry's stomach and he died a short time later.

At trial, appellant admitted he was holding the revolver when the shot was fired, but insisted the shooting was accidental. Testimony at trial from eyewitnesses as to what actually happened when the shot was fired is contradictory, and evidence of appellant's guilt in intentionally causing Larry's death is not overwhelming. The jury, however, after considering all the evidence, found the appellant guilty of first degree murder.

On this appeal, appellant contends it was prejudicial error for the trial court to permit the Honorable Lester Burns, private counsel retained by Larry Johnson's mother, to assist the Commonwealth's Attorney in prosecuting the case. This contention is without merit. Prior to trial, the Commonwealth's Attorney, the Honorable James Allen, gave permission to Mr. Burns to assist in the prosecution of the appellant, provided that the prosecution of the case proceed according to law and that justice be done for all parties. The trial court ruled that Mr. Burns could assist in the prosecution so that the family of the deceased would feel that justice was done. Mr. Allen conducted voir dire and remained seated at counsel's table throughout the remainder of the trial while Mr. Burns prosecuted the case.

It has long been the law in this jurisdiction that private counsel retained by persons desirous of a conviction are permitted to assist the commonwealth's attorney in the conduct of the prosecution. *Benningfield* v. *Commonwealth*, Ky., 17 S. W. 271 (1891); *Adams* v. *Commonwealth*, Ky., 111 S. W. 348 (1908); *Tackett* v. *Commonwealth*, Ky., 12 S. W. 2d 289 (1928). Because the entire prosecution of the

case was not turned over to private counsel, and the commonwealth's attorney was present in the courtroom during trial, we find no error in the trial court's allowing Mr. Burns to assist the commonwealth's attorney in the conduct of the prosecution of the case. See, 63 Am. Jur. 2d, Prosecuting Attorneys, Sec. 9.

Appellant Stumbo's next contention is that the conduct and remarks of Mr. Burns during both cross-examination and closing argument were prejudicial to him and were calculated to inflame the jury. Instances of Mr. Burns' misconduct cited by Stumbo include: calling the victim "the dead boy" on ten separate occasions during trial; repeatedly shouting at witnesses; flourishing the murder weapon in the faces of the jury and the witnesses; snapping the revolver's trigger repeatedly while cross-examining the appellant; calling the appellant "Johnny Murder Boy;" calling the victim's death an execution; referring to the offense as "cold-blooded murder" several times; calling appellant's defense a "cock-and-bull story;" calling for a guilty verdict to prevent murder cases from being "stacked-up" in Floyd County; stating to the jury during closing argument that the appellant "committed the crime of murder, in our opinion—;" asking questions of defense witnesses Mr. Burns knew would be denied and for which he knew no proof would be offered; and repeating questions previously ruled inadmissible. Appellant objected to each of the above instances.

We find much of the conduct complained of to be improper. The most serious lapse in prosecutorial discipline occurred, in our opinion, when Mr. Burns asked questions of Milton Stumbo in cross-examination calculated to put matters before the jury that were not in evidence. The following is from the transcript of evidence.

"Mr. Burns: I will rephrase the question, Your Honor.

By Mr. Burns:

Q. 29. Let me go it this way. Call it what you want to. After you got out bang with that big gun and bang with that big gun there and got in your car and Stevie got in, whatever you want to call that, did you and Stevie discuss getting even with Larry Johnson?

A. No.

Q. 30. Isn't it true that you said, 'I'll get him this time and if I don't you back me up, Stevie'?

A. No.

Mr. Johnson: Your Honor, I want to object to that question.

By Mr. Burns:

Q. 31. Is that true?

A. No.

Mr. Johnson: I want to object to that, Your Honor. May I approach the Bench?

The Court: Yes.

(Discussion at the Bench out of the hearing of the jury and as follows:)

Mr. Johnson: Your Honor, I don't really object to his asking the question of what transpired or vigorous cross-examination of what transpired in the vehicle, but I think it may be unethical conduct and certainly improper to ask a question for which you do not have any foundation in the evidence. Now Mr. Burns' question was not 'Did you plan to do something?' but he said, 'Isn't it a fact that you said . . .' and there's been no testimony as to what was said. If he is going to ask that question, I think it only proper that he make an offer of proof at this time that those words were in fact said.

The Court: Yes, the question was calculated to put evidence before the jury that is not there.

Mr. Burns: I will rephrase the question, but I am under no duty to put testimony. I will rephrase.

The Court: Sustain the objection.

(End of discussion at the Bench.)

The Court: Sustain the objection.

(Discussion at the Bench out of the hearing of the jury and as follows:)

Mr. Johnson: Because of the nature of that question I am going to ask you set aside the swearing of the jury and declare a mistrial. That statement could be to no effect but to calculate and prejudice and inflame the jury.

The Court: Overrule the objection.

(End of discussion at the Bench.)

Mr. Johnson: Excuse me.

(Discussion at the Bench out of the hearing of the jury and as follows:)

Mr. Johnson: Seeing as how you have overruled my motion I think it behooves me to move for an admonition.

(End of discussion at the Bench.)

The Court: The last question asked by Mr. Burns to the effect didn't you do so and so and the statement he made didn't you say to Stevie 'We'll get him,' the jury won't consider that because there has been no evidence introduced as to that statement made by the attorney for the Commonwealth.

By Mr. Burns:

Q. 32. Tell the ladies and gentlemen of the jury what you said to Stevie and what he said to you while you were in the car before he got out and you got out the last time.

A. Absolutely nothing.

Q. 33. Not a word?

A. No.

Q. 34. I thought you told the jury when you reached for the gun Stevie said you can't have it, didn't you?

Mr. Johnson: Your Honor, objection. There was no—

The Witness: No.

Mr. Johnson: —no testimony to that effect. Mr. Burns knows that. That question is designed and calculated to prejudice and inflame the jury. It serves no other purpose in this trial. There is no evidence introduced to that effect.

The Court: Overrule the objection. That is up to the jury to recall whether there is any evidence to that effect."

This conduct on the part of Mr. Burns cannot be said to be proper. It falls short, however, of substantially prejudicing appellant Stumbo because the admonition given by the trial court to the jury effectively cured the prejudice resulting from the misconduct. After considering this issue against the background of the entire case, we conclude that the misconduct in question did not produce that level of prejudice to the appellant which requires reversal. Cf., *Hunt* v. *Commonwealth,* Ky., 466 S. W. 2d 957 (1971); *Richards* v. *Commonwealth,* Ky., 517 S. W. 2d 237 (1974); *Vontrees* v. *Commonwealth,* 291 Ky. 583, 165 S. W. 2d 145 (1942).

We find no other reversible errors.

The judgment of the Floyd Circuit Court is affirmed.

All concur.

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SUPREME COURT OF KENTUCKY

80-SC-422-MR

STEVE STUMBO - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Floyd Circuit Court
Honorable Hollie Conley, Judge
79-CR-060

ORDER DENYING PETITION FOR REHEARING

Appellant's petition for rehearing is denied.

All concur.

ENTERED February 17, 1981.

(s) John S. Palmore
Chief Justice